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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID WESLEY CARLILE,

Defendant and Appellant.

C087698

(Super. Ct. No. 96F01396)

Appointed counsel for defendant David Wesley Carlile has asked us to review the record for arguable issues in this appeal from the denial of his successive petition to modify his three strikes sentence pursuant to Penal Code section 1170.126.<sup>1</sup> *People v. Wende* (1979) 25 Cal.3d 436. As we explain, we assume for the sake of argument that defendant is entitled to *Wende* review at this stage of his case and independently review

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

the record for error. Finding no error that would arguably result in a more favorable disposition for defendant, we affirm.

### **BACKGROUND**

In 1996 defendant pleaded guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and admitted two prior strikes. He was sentenced to 25 years to life in prison. We affirmed his conviction in 1997. (*People v. Carlile* (Feb. 20, 2015, C074991) [nonpub. opn.] slip opn. at p. 1 (*Carlile II*).)

Defendant had prior convictions for kidnapping (§ 207), assault by means likely to produce great bodily injury (§ 245, subd. (a)), attempted forcible rape (§§ 664, 261), and attempted forcible oral copulation (§§ 664, 288a) with great bodily injury enhancements (§ 12022.7) as to all the crimes.

On February 20, 2015, we filed an opinion affirming the denial of his first resentencing opinion that detailed defendant's actions and the relevant procedural facts as follows:

“Shortly after 2:00 a.m. on November 9, 1980, defendant and Wesley Washington were returning from a party in a car driven by Arthur Simpson. The 19-year-old victim had just left a different gathering and was standing on the side of the road. At defendant's suggestion, Simpson stopped the car near the victim. Washington, who was riding in the front seat, got out and offered the victim a ride. The victim was equivocal, so Simpson and the others drove off. Twenty or thirty yards down the road, defendant became agitated and insisted on returning for the victim and soliciting her for multiple sex acts. Simpson then drove back to where the victim was conversing with a male friend.

“Washington tried to coax the victim into the car, promising her a ride. When she refused, defendant threw her into the back seat. As Simpson drove away, defendant began to beat the victim, telling her to “shut up, sit still,” while intermittently giving Simpson directions on where to drive. Washington told defendant to “[s]hut that bitch

up.” The victim was moaning and struggling. Simpson could hear “fist-to-face” blows emanating from the back seat; there were about 40 such blows during the ride. Blood from the victim was later found smeared on the back seat, deck, windows, and on the backside of the front seat. Defendant’s hands were bruised and there were cuts on his knuckles when he was arrested a week later.

“Following directions from defendant and Washington, Simpson stopped the car in a remote area. Defendant and Washington removed the victim from the car and took her down a hillside near a pasture. Simpson parked the car and returned to where he could see defendant and Washington with the victim. He saw defendant kneeling over the victim’s head and heard defendant command her to orally copulate him. At the same time, Simpson saw Washington facing defendant over the victim’s body and “rustling around” on the ground.

“Defendant later asked Simpson whether he wanted to have sex with the victim; Simpson declined. Simpson saw defendant hitting the victim again before he and Washington picked up defendant and drove away, leaving her there.

“The victim was discovered the next morning by boys who heard her moans. She sustained a cerebral concussion, multiple abrasions, and lacerations on her arms, shoulders and legs, genital bruising, nasal fractures and a “blow out” fracture of the bone under her left eye. Surgery was required to repair the facial fractures; the procedure was risky because of the proximity of the optic nerve. The surgeon testified that the victim very easily could have been blinded in the left eye and would have a permanent scar under her eye from that laceration.

“In September 2013, defendant filed a petition for resentencing pursuant to section 1170.126. The petition asserted that none of defendant’s prior convictions rendered him ineligible for resentencing. Defendant specifically noted that none of his offenses qualified as sexually violent offenses under Welfare and Institutions Code section 6600,

as that classification did not encompass attempted rape and attempted oral copulation by force. The petition did not specifically discuss his kidnapping conviction.

“The trial court denied the petition in a written opinion without ordering briefing or holding a hearing. Relying on the facts of the prior convictions as set forth in our 1983 opinion, as summarized ante, the trial court found beyond a reasonable doubt that the prior kidnapping conviction was committed with force and the intent to commit sex crimes as listed in Welfare and Institutions Code section 6600, subdivision (b), rendering it a sexually violent offense and rendering defendant ineligible for resentencing.” (*Carlile II*, *supra*, C074991 [nonpub. opn.] slip opn. at pp. 2-4.) Defendant appealed, and we affirmed. (*Id.* at p. 2.)

Defendant filed a new section 1170.126 petition in May 2018, asserting he was entitled to relief pursuant to a recent decision by our Supreme Court that precludes a sentencing court from increasing a sentence based on its own independent conclusions about the nature or basis of a prior conviction. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 136.) The trial court denied the petition, finding defendant did not establish good cause for filing a petition more than two years after the effective date of section 1170.126. (See § 1170.126, subd. (b) [precluding petitions filed more than two years after the effective date of Proposition 36 absent a showing of good cause].)

## **DISCUSSION**

Whether the protections afforded by *Wende* and the United States Supreme Court decision in *Anders v. California* (1967) 386 U.S. 738 apply to an appeal from an order denying a petition brought pursuant to Proposition 36 remains an open question. The *Anders/Wende* procedures address appointed counsel’s representation of an indigent criminal defendant in the first appeal as a matter of right and courts have been loath to expand their application to other proceedings or appeals. (See *Pennsylvania v. Finley* (1987) 481 U.S. 551; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529; *In re Sade C.* (1996) 13 Cal.4th 952; *People v. Serrano* (2012) 211 Cal.App.4th 496; *People v. Dobson*

(2008) 161 Cal.App.4th 1422; *People v. Taylor* (2008) 160 Cal.App.4th 304; *People v. Thurman* (2007) 157 Cal.App.4th 36; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570.) Nonetheless, here counsel has already undertaken to comply with *Wende* requirements, and we will decide the appeal.

Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and we have received no communication from defendant.

Having undertaken an examination of the record, we find no arguable error that would result in a disposition more favorable to defendant.

#### **DISPOSITION**

The judgment (order) is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_, J.  
Duarte

We concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Blease, Acting P. J.

\_\_\_\_\_/s/\_\_\_\_\_  
Mauro, J.